IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 20TH JULY 2007 / 29TH ASHADHA 1929

WP(C).No. 6527 of 2005(B)

EP.226/2003 IN OS.513/01 of PRL.M.C.,KANNUR

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PETITIONER:

C.GOPALAN, S/O. KUNHIRAMAN,
AGED 57 YEARS, EX-SERVICEMEN, RESIDING
AT 'SOUPARNIKA', VADUVANKULAM,
P.O.KUTIATTOOR, KANNUR.

BY ADV. SRI.V.RAMKUMAR NAMBIAR

RESPONDENT:

M.SANTHOSH S/O.SANKARAN,
AGED 36 YEARS, SALESMAN, RESIDING AT
MOLICHAN HOUSE, P.O.KANNADIPARAMBA,
KANNUR DISTRICT.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.6527/05

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF EP.226/03 BEFORE MUNSIFF'S COURT, KANNUR.

EXT.P2 AND P2(A) – TRUE COPY OF THE AFFIDAVIT SWORN TO BY RESPONDENT AND THE ACCOMPANYING PETITION.

EXT.P3 – TRUE COPY OF AFFIDAVIT FILED BY PETR. AS PER DIRECTION OF EXECUTION COURT ON 11.8.04.

EXT.P4 – TRUE COPY OF ORDER OF MUNSIFF'S COURT, KANNUR DT.8.2.05 COPIED BY PETR. FROM COURT.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C)No.6527 OF 2005

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DATED THIS THE 20th JULY, 2007

J U D G M E N T

Ext.P4 order of the execution court finding that the petitioner-judgment-debtor, in spite of sufficient means, has wilfully neglected to pay the decree-debt and directing issuance of warrant for his arrest and detention on that basis is under challenge in this Writ Petition under Article 227 of the Constitution.

2. Even though the respondent was served with notice, he has not entered appearance before this Court.

3. Heard Sri.V.Ramkumar Nambiar, counsel for the petitioner. Counsel submits that the impugned order is not preceded by any enquiry of the nature contemplated by Rule 40 of Order XXI C.P.C. According to him, the court has acted upon Ext.P3 affidavit which was filed by the judgment-debtor in response to an order passed by the court that an affidavit in terms of Order XXI Rule 41(2) be filed before the court. Ext.P3, learned counsel submits, does not contain any admission regarding the ability of the petitioner to pay off the decree-debt or regarding his negligence in the matter of payment. Counsel also submitted that what if at all has been admitted under Ext.P3 is only that the petitioner has a take-home pension of Rs.1125/-.

4. On going through Ext.P4, what I find is that the court below has entered a finding that the petitioner is having sufficient means and that he is wilfully avoiding payment, solely on the basis of Ext.P3. When one carefully reads Ext.P3, it will be seen that what has been admitted therein is only that the petitioner is having a monthly income of Rs.1125/- after discharging his obligation to the State Bank of India in connection with a loan availed from that bank. But, at the same time, I do not find anything wrong in the learned Munsiff having ignored the repayments which are being made by the petitioner towards the loan availed from the State Bank of India for the purpose of determining the monthly income. The monthly income is Rs.2125/- less any amount which may be legally exempt from attachment in execution. The relevant question is whether it could be said that the petitioner has, after the passage of the decree, come to have means sufficient to pay off the decree-debt in a lump or a substantial portion of the same. Since it is conceded that the decree was passed way back on 31.7.2002, the attachable portion of the salary which could have come into the hands of the petitioner till the date of passage of the impugned order would have been enough to pay off a substantial portion of the decree-debt which, I am told, is only around

Rs.23,000/-. But I find that an enquiry in that line is not seen done by the learned Munsiff.

5. Mr.Ramkumar Nambiar has a grievance that the learned Munsiff did not afford opportunity to the petitioner for adducing counter-evidence. Considering the above grievance and the observations made hereinbefore, I feel that there is justification for interfering with the impugned order and directing further enquiry, giving opportunity to the petitioner for adducing counter-evidence to the evidence adduced by the decree-holder through Ext.P2. It is open to the petitioner to explain his own affidavit Ext.P3 during that enquiry. But I am inclined to grant that opportunity only on conditions.

6. I am told that the petitioner has already complied with the condition imposed by this Court for granting stay that a sum of Rs.7500/- shall be paid towards the decree-debt. The petitioner will pay a further sum of Rs.2500/- to the decree-holder towards the decree-debt within one month from today. Once the above payment is made, the impugned order will stand set aside and the execution petition will go back to the learned Munsiff who will allow the petitioner to adduce whatever counter-evidence he wants to, enter specific findings as to whether it can be said that the petitioner has, after the

passage of the decree, come to possess means sufficient to pay off the decree-debt in a lump or a substantial portion thereof. On the basis of such findings, fresh orders will be passed by the learned Munsiff. But if the petitioner does not comply with the above condition, he will forfeit the benefit of this judgment and the Writ Petition will stand dismissed.

The Writ Petition is disposed of as above.

(PIUS C.KURIAKOSE, JUDGE)

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